

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN EUGENE DENNEY,

Defendant-Appellant.

UNPUBLISHED

August 30, 2005

No. 254997

Calhoun Circuit Court

LC No. 2003-001716-FH

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Defendant Norman Eugene Denney appeals as of right his conviction of assaulting, resisting, or obstructing a police officer, who he knew or had reason to know was performing his duties.¹ He was sentenced to two to fifteen years' imprisonment. We affirm.

I. Factual Background

On May 6, 2003, Battle Creek Police Officer Joseph Wilder responded to a complaint that residents at 211 Iroquois Avenue in Battle Creek were racing vehicles down the roadway. Officer Wilder parked in the street and was met in the driveway by codefendant Kathleen Carter, who lived with defendant at that address. Ms. Carter indicated that she had just arrived home and was unaware of the situation. She inquired about the identity of the complainant and mentioned a problem with her neighbors. Officer Wilder refused to disclose the complainant's identity in order to prevent further conflict. However, Ms. Carter was insistent and their conversation became heated. Officer Wilder warned Ms. Carter not to raise her voice and threatened to arrest her. In response, Ms. Carter loudly instructed Officer Wilder to leave her property. Officer Wilder clearly and repeatedly announced that Ms. Carter was under arrest.² Yet, she attempted to leave the scene. Officer Wilder grabbed Ms. Carter and placed her in a

¹ MCL 750.81d(1).

² Officer Wilder testified that he was arresting Ms. Carter for being loud and boisterous, an ordinance violation akin to disturbing the peace.

bear hug in order to restrain her.³ Ms. Carter struggled with Officer Wilder, and she yelled for “Norm” or “Norman.”

In response to Ms. Carter’s calls, defendant came up from behind Officer Wilder. He testified that he saw Officer Wilder holding Ms. Carter by the throat with his knee in her back. He believed that Officer Wilder was going to paralyze Ms. Carter, who had suffered a previous back injury. He grabbed Officer Wilder and the two tumbled to the ground. Defendant’s arm was around Officer Wilder’s neck, choking him. Defendant landed on top of Officer Wilder, preventing his retreat. However, defendant testified that when he tried to stand up, Officer Wilder pulled him back down. Officer Wilder attempted to summon help with a portable radio microphone attached to his collar. He testified that defendant grabbed the wire from the microphone and yanked it out of the radio box.⁴ Richard Roth, who was visiting defendant’s home, pulled defendant away from Officer Wilder. Officer Wilder stood up and pointed his service weapon at defendant, warning him to stay back. Officer Wilder radioed for assistance and both defendant and Ms. Carter were subsequently arrested.

II. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence to support his conviction. He specifically argues that, as Ms. Carter’s arrest was illegal, he was entitled to intervene to prevent it. In sufficiency of the evidence claims, we review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁵ “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁶

Defendant was convicted of assaulting, resisting, or obstructing a police officer in the performance of his duties in violation of MCL 750.81d(1), which provides:

Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.⁷

³ Officer Wilder’s patrol car was equipped with audio and video equipment. The videotape of the incident was played for the jury and is part of the lower court record. Although the audio of this incident was recorded, the conversation and subsequent altercation occurred out of the camera’s view.

⁴ Defendant testified that the wire broke when he tried to untangle it from his arm.

⁵ *People v Hunter*, 466 Mich 1,6; 643 NW2d 218 (2002).

⁶ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

⁷ MCL 750.81d(1).

“Obstruct” is defined, in relevant part, as “the use of physical interference or force.”⁸ The term “person” includes a police officer.⁹ In order to prove that a defendant “knows or has reason to know [that the police officer] is performing his or her duties,” the prosecutor must prove actual, constructive, implied, or imputed knowledge.¹⁰ The prosecution may use “the record evidence to show that a defendant should have had knowledge on the basis of the facts and circumstances of the case.”¹¹

The trial court required the prosecutor to establish that Officer Wilder was attempting to effectuate a legal arrest as an element of the offense. Had defendant been charged pursuant to the former resisting arrest statute, MCL 750.479,¹² the legality of Ms. Carter’s arrest would have been an element of the crime.¹³ However, this Court has found that, as MCL 750.81d is silent regarding the lawfulness of the underlying arrest or other detaining act, an individual has no right to resist or obstruct an illegal arrest.¹⁴ In criminalizing the use of force to obstruct or resist an arrest, the Legislature intended to prohibit such conduct “regardless of whether the arrest is illegal under the circumstances of the occasion.”¹⁵ “Assaulting, resisting, or obstructing an officer while he is performing his duty must be avoided for the safety of all society, regardless of the legality of the arrest.”¹⁶ However, as the trial court placed the additional burden on the prosecution, defendant was not prejudiced by this error.¹⁷

⁸ MCL 750.81d(7)(a).

⁹ MCL 750.81d(7)(b).

¹⁰ *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004).

¹¹ *Id.*

¹² MCL 750.479 provided in relevant part:

Any person who shall knowingly and wilfully . . . obstruct, resist, oppose, assault, beat or wound any . . . person or persons authorized by law to maintain and preserve the peace, in their *lawful acts*, attempts and efforts to maintain, preserve and keep the peace. [Emphasis added.]

MCL 750.81d was enacted in 2002, and MCL 750.479 was amended to exclude the crime of resisting arrest.

¹³ *People v Ventura*, 262 Mich App 370, 375; 686 NW2d 748 (2004).

¹⁴ *Id.*

¹⁵ *Id.* at 376-377.

¹⁶ *Id.* at 377. Although an individual has the right to resist an illegal arrest under MCL 750.479, this Court questioned this “outmoded and dangerous doctrine.” *People v Wess*, 235 Mich App 241, 244 n 1; 597 NW2d 215 (1999); *Detroit v Smith*, 235 Mich App 235, 239; 597 NW2d 247 (1999).

¹⁷ *People v Byrd*, 133 Mich App 767, 774-775; 350 NW2d 802 (1984).

Viewed in the light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction beyond a reasonable doubt. Officer Wilder was on the premises on an official call of complaint. He arrived in a marked police car and in full uniform. Defendant admitted at trial that he knew that Ms. Carter was speaking with a police officer. He heard parts of the conversation, including Ms. Carter telling Officer Wilder to leave the premises. He heard Officer Wilder loudly and repeatedly announce that Ms. Carter was under arrest. Defendant subsequently attacked Officer Wilder, who was attempting to gain control of Ms. Carter to effectuate an arrest. The evidence was sufficient to establish that defendant used physical force to interfere with Officer Wilder's arrest of Ms. Carter, knowing that Officer Wilder was performing his duties as a police officer. The legality of Ms. Carter's arrest is immaterial.

Moreover, even if the legality of Ms. Carter's arrest was an element of the charged offense, defendant would have no right to intervene and obstruct that arrest. This Court has never considered whether a defendant can raise defense of another in response to a charged violation of MCL 750.81d. However, this Court has found that a defendant charged with violating the former resisting arrest statute did not have the right to intervene and obstruct the illegal arrest of another.¹⁸ MCL 750.81d is more restrictive than the former resisting arrest statute. Defendant would not be entitled to resist his own illegal arrest. Therefore, he was not entitled to obstruct Officer Wilder's arrest of Ms. Carter.

III. Expert Opinion Testimony

Defendant asserts that the trial court improperly compromised his defense by precluding the introduction of expert testimony regarding the factors that constitute a legal arrest. Expert testimony may be received where necessary or helpful to the trier of fact in deciding a material issue.¹⁹ The proffered expert testimony would clearly be helpful to the jury in determining whether Officer Wilder's arrest of Ms. Carter was lawful. However, as previously discussed, the trial court erroneously determined that the legality of the arrest was an element of the charged offense. Accordingly, the expert testimony was irrelevant and its exclusion was not prejudicial.

IV. Effective Assistance of Counsel

Defendant contends that he was deprived of the effective assistance of counsel, as trial counsel failed to request several necessary jury instructions. Absent a *Ginther*²⁰ hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.²¹ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove

¹⁸ *Wess*, *supra* at 244. See also *Smith*, *supra* at 237-239 (holding that a third party may not interfere with an illegal arrest pursuant to a similar city ordinance).

¹⁹ *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992); MRE 702.

²⁰ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

²¹ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defendant did file a motion for a new trial, but on other grounds.

otherwise.²² To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.²³ Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.²⁴

Defendant challenges trial counsel's failure to request an instruction defining the crime for which Officer Wilder originally attempted to arrest Ms. Carter. Without such an instruction, defendant contends that the jury could not determine whether Officer Wilder was performing his "lawful obligations." He also asserts that counsel should have requested an instruction regarding defense of another. As we have already noted, however, the legality of Ms. Carter's arrest was not an element of the charged offense. Defendant was also not entitled to intervene and obstruct the illegal arrest of another. Therefore, defendant was not entitled to these instructions. Counsel is not ineffective for failing to advocate a meritless position.²⁵

Defendant also asserts that trial counsel was ineffective for failing to request a lesser offense instruction for misdemeanor assault and battery. We disagree. MCL 768.32(1) only permits instructions on necessarily included lesser offenses, not cognate lesser offenses.²⁶ A cognate lesser offense shares some common elements with, and is of the same class as, the greater offense, but also has elements not found in the greater offense.²⁷ A necessarily included lesser offense must be committed as part of the greater offense, such that it is impossible to commit the greater without first having committed the lesser.²⁸

Resisting arrest in violation of MCL 750.81d can include an assault and battery. However, assault and battery requires proof of a wilful touching by an aggressor.²⁹ Moreover, resisting arrest in violation of MCL 750.81d may be committed without the defendant first committing a misdemeanor assault and battery. It may be committed merely by failing to comply with a lawful command.³⁰ Therefore, assault and battery is not a necessarily included lesser offense of resisting arrest under MCL 750.81d. Accordingly, defendant was also not entitled to this instruction.

²² *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²³ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

²⁴ *Id.* at 600.

²⁵ *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

²⁶ *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

²⁷ *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

²⁸ *Id.*

²⁹ *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Ritcher*, 295 Mich 396, 401; 295 NW 201 (1940).

³⁰ MCL 750.81d(7)(a).

V. Sentencing Issues

A. OV 4

Defendant challenges the trial court's scoring of Offense Variable (OV) 4.³¹ "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record supports a particular score."³² A scoring decision will be upheld if there is any evidence to support it.³³ Ten points are scored for OV 4 if the victim suffered "[s]erious psychological injury requiring professional treatment."³⁴ Officer Wilder testified at trial that, during defendant's attack, he thought of his family and believed he was going to die. Evidence was presented at sentencing that Officer Wilder was in counseling as a result of the incident. Accordingly, the trial court properly assessed ten points for OV 4.

Defendant also contends that, in scoring OV 4, the trial court relied on facts not found by the jury in violation of *Blakely v Washington*.³⁵ However, a majority of the Michigan Supreme Court has decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law.³⁶

B. Inaccurate PSIR

Defendant also challenges the accuracy of the presentence investigation report (PSIR). A sentencing court must respond to challenged inaccuracies in a PSIR.³⁷ The court must strike from the PSIR any information deemed to be inaccurate, or, if the court fails to review the challenge, the court must specifically indicate that a defendant's sentence is not based on that information.³⁸

Defendant first challenges references in the PSIR to his statements that he wanted to kill Officer Wilder. In arguing that defendant was entitled to a lenient sentence, defense counsel asserted that defendant's statements during his interview with the probation officer preparing the PSIR were taken out of context.³⁹ Although no correction was requested by defendant, the trial

³¹ MCL 777.34.

³² *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

³³ *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

³⁴ MCL 777.34(1)(a).

³⁵ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004)

³⁶ *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver, and Young concurred with Justices Taylor and Markman writing for the Court); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

³⁷ *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

³⁸ *Id.* at 649.

³⁹ The PSIR reflected that defendant "insisted that he 'would do the same thing again'" and "that
(continued...)

court questioned the author of the PSIR, who reviewed her notes and verified the accuracy of the reported statements. The trial court accepted that the statements were properly reported. The trial court appropriately responded to defendant's challenge to the accuracy of the statements, and there is no record evidence to support his challenge.

Defendant also raises three challenges to information in the PSIR for the first time on appeal. Defendant challenges the accuracy and relevance of: (1) a reference to the malicious destruction of police property; (2) the PSIR author's opinion that defendant did not understand that his actions were unjustifiable; and (3) the PSIR author's discussion with Officer Wilder regarding the impact of this incident. However, defendant has waived his right to appellate review of these issues. "A party shall not raise on appeal an issue . . . challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing"⁴⁰ Defendant's sentence is within the appropriate minimum sentencing guidelines range and we must, therefore, affirm.⁴¹ However, we note that the challenged information falls within the broad spectrum of information appropriate for a PSIR.⁴²

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

(...continued)

the day following the incident he 'wanted to kill' Officer Wilder and further stated that '[he was] not sure that [he doesn't] still want to kill him.'"

⁴⁰ MCL 769.34(10); MCR 6.429(c); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

⁴¹ MCL 769.34(10).

⁴² See *Morales v Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003).